ple, without excuse or shadow of right for his action, either before or after its doing, and the doer of a similar wrong, invested by the constitution and statutes with the right to do what it did, but who began its proceedings under such right after, instead of before, the act was committed, seems only just and right. In the first case the law imposes the unusually heavy penalty of forfeiture of all title in and to such improvements. That such a penalty should be imposed in the latter case would seem to be applying the strict rule of the common law to circumstances and conditions not contemplated before the modern advance in scientific government, where the interests of the public have been intermingled with corporate rights to an extent hitherto undreamed of.

The question has never been brought squarely before our court, but in the cases cited above the position taken would forecast the severe penalty to corporations so offending, though even those cases holding that the owner is entitled to compensation for improvements put on the land without authority do not go so far as totallow him the full value of such improvements—rather the measure of compensation is governed by the extent to which the value of the land is enhanced by reason of such improvements. As said in Village of St. Johnsville *v.* Smith, supra: "In holding, as we do, that the appellant is entitled to have the improvements made upon his land by the respondent while a trespasser taken into consideration in ascertaining his compensation, it must be distinctly understood that the measure of such compensation is neither the cost of the improvements nor their value or the value of their use to the village. The true inquiry is, how much do the improvements placed upon the property enhance the value of the appellant's land?" Village of St. Johnsville *v.* Smith, 184 N. Y. 341, 77 N. E. 617, 5 L. R. A., N. S., 922, 926.

M. B.

SPENCER *v.* LOONEY.

Sept. 7, 1914.

[82 S. E. 745.]

1. Libel and Slander (§ 6*)—Words Slanderous Per Se—Calling White Person Negro.—Since the thirteenth, fourteenth, and fifteenth amendments of the federal Constitution, conferring on negroes residing in the United States equal political rights with white persons, did not in any manner affect the social relations of the two races, such amendments are no defense to an action for slander, consisting in calling a write person a negro, which words were defamatory and actionable.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 3-16; Dec. Dig. § 6.*]

2. Libel and Slander (§ 51*)—Privilege—Malice.—Where defendant, by reason of a feud, instituted proceedings to have defendant's

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

child denied white school privileges, charging that plaintiff and his child were negroes when in fact they were white persons, and the charge was spoken in strong and violent language disproportionate to the occasion, the privilege that defendant might have had under other circumstances to test the question whether plaintiff's child was entitled to white school privileges was lost.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 149; Dec. Dig. § 51.*]

3. Libel and Slander (§ 51*)—Privileged Communications—"Absolutely Privileged"—"Qualifiedly Privileged."—A communication "absolutely privileged" is one for which an action will not lie, even though the words are published maliciously and with knowledge of their falsity, while a communication "qualifiedly privileged" is one which is prima facie privileged only, and in which the privilege may be lost by proof of malice in the publication.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 149; Dec. Dig. § 51.*

For other definitions, see Words and Phrases, vol. 1, pp. 45, 46; vol. 7, p. 5877.]

4. Libel and Slander (§ 112*)—Calling White Person Negro—Truth—Evidence.—In an action for slander in calling plaintiff and his son negroes, evidence held insufficient to warrant a finding that either plaintiff or his children had as much as one-sixteenth negro blood.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 325-341; Dec. Dig. § 112.*]

5. Libel and Slander (§ 124*)—Qualified Privilege—Instructions—Malice.—Where, in an action for slander there was evidence that defendant had charged plaintiff and his son with being negroes in strong and violent language in an investigation as to whether plaintiff's son was entitled to white school privileges, a requested charge that "strong or violent language, disproportioned to the occasion, may of itself raise an inference of malice" was improperly modified by the addition of "except where the jury may believe from the evidence that the party using the language was engaged in a bona fide investigation for a lawful purpose."

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 365-370, 372, 373; Dec. Dig. § 124.*]

6. Appeal and Error (§ 882*)—Right to Allege Error—Modification of Instruction—Proposition Submitted by Plaintiff in Error.—Plaintiff in error was not prejudiced by the modification of a requested charge so as to embody the same proposition of law propounded in an instruction requested by him and given as modified.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

7. Libel and Slander (§ 107*)—Race—Neighborhood Reports. — Where plaintiff sued defendant for slander in charging plaintiff and his son with being negroes, in proceedings to deprive plaintiff's son of white school privileges, mere reports in the neighborhood where plaintiff lived prior to the origin of the controversy out of which the suit arose, as to whether plaintiff's children had one-sixteenth or more negro blood, had no bearing on the question of plaintiff's damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 299-303, 305, 351; Dec. Dig. § 107.*]

8. Libel and Slander (§ 124*)—Evidence—Instructions.—In an action for slander in calling plaintiff and his son negroes, requested charges that if the jury found certain genealogical facts to be true, then plaintiff's son had less than one-sixteenth negro blood and was a white person, and entitled to attend the white schools of Virginia, and if defendant used and reiterated the words complained of, and they were untrue, that was a circumstance tending to show malice, were proper.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 365-370, 372, 373; Dec. Dig. § 124.*]

9. Evidence (§ 382*)—Photographs.—On an issue whether plaintiff and his son were negroes, a photograph of plaintiff's grandfather and a photograph of his grandfather's daughter and her children, which plaintiffs testified were correct pictures, were admissible, and improperly excluded on the ground that the court was of the opinion that they had been taken from other photographs.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1658, 1659; Dec. Dig. § 382.*]

10. Evidence (§ 508*)—Experts—Qualification.—A witness, not shown to have possessed proper qualifications, was incompetent to testify as to whether from the personal characteristics of plaintiff's son he was more than one-sixteenth negro.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2311; Dec. Dig. § 508.*]

Error to Circuit Court, Buchanan County.

Action by George Spencer against George Looney. Judgment for defendant, and plaintiff brings error. Reversed.

Chase & Daugherty, of Grundy, for plaintiff in error.

S. M. B. Coulling, of Tazewell, and *Glenn Ratliff,* for defendant in error.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

CARDWELL, J. This action is brought by plaintiff in error against the defendant in error to recover damages for slanderous, defamatory and insulting words alleged to have been used by defendant in error of and concerning plaintiff in error and members of his family, particularly of and concerning his son, Melvin on divers occasions and in the presence of certain named persons and divers other good and worthy citizens of the commonwealth.

The declaration contains a number of counts, the gravamen of which is that, while the plaintiff and his wife and their children and each and all of them are white persons, of pure Caucasian blood, and each and all of them had always been reputed, esteemed, and accepted by and amongst all their neighbors and other good and worthy citizens of the commonwealth, to whom they were in any wise known, to be white persons of pure Caucasian blood, until the defendant, well knowing the premises, but contriving and maliciously and wickedly intending to insult the plaintiff and to injure him in his good name, fame, and credit, and to bring him into public infamy, scandal, and disgrace, and to cause it to be suspected and believed by and amongst the plaintiff's neighbors and other good and worthy citizens of this commonwealth that the plaintiff and his wife and children were not white persons of pure Caucasian blood, but were negroes, did in the presence and hearing of certain named persons and divers other good and worthy citizens falsely and maliciously, and with the intent to insult and injure the plaintiff, speak and publish of and concerning plaintiff, his wife and children, the false, scandalous, malicious, defamatory, and insulting words, viz.:

"They [meaning the plaintiff, his wife and their children] are nothing but God damned negroes, and I [meaning himself, the defendant] can prove that they [meaning the plaintiff, his wife and their children] are God damned negroes."

Defendant in error set up as his defense to this action:

"First, not guilty; second, that while he confessed to speaking the words alleged in the declaration of and concerning plaintiff in error, his wife and children, and especially of his son Melvin, these words were true as to them, because 'The said plaintiff and his children and his son, Melvin, were negroes, and this the defendant had the right to so speak of and concerning the said plaintiff and his children and his son, Melvin, because they were and are negroes; * * *'" that "this defendant never spoke of or concerning the said plaintiff's wife as in the said declaration alleged, but did so speak of and concerning the said plaintiff and his children, and especially of plaintiff's son, Melvin."

It appears that plaintiff in error, who was about 30 years of age when this action was brought and who is a son of Jordan Spencer, Jr., and a grandson of Jordan Spencer, Sr. (now deceased), lived in Johnson county, state of Kentucky, until he was about 15 years of age, and has since that time lived in Buchanan county, Va., where he some years ago married a daughter of Ray Justus, a citizen of Buchanan county, and they have several children, the oldest, about 9 years of age, being Melvin above mentioned. The descendants of Jordan Spencer, Sr., have at all times for 50 years or more been permitted to attend the white public schools of both the states of Kentucky and Virginia, and they and all of them have been treated and respected by their white neighbors and associates as white people, plaintiff in error and his father having in recent years worked for defendant in error and stayed at his home, where they were treated as white people, eating at his table and sleeping in his beds. About two years prior to the trouble out of which this suit arises Jack Spencer, a brother of plaintiff in error, was accused of killing one Henderson Looney, a brother of defendant in error, and after that time, as it appears, the latter began to raise objections to plaintiff in error's boy, Melvin, attending the white public free schools of Buchanan county, accusing plaintiff in error and his family of being negroes, and through strenuous efforts, involving costs and expenses, secured and published affidavits purporting to have been made by persons in Kentucky, by reason of which the boy, Melvin, was turned out and denied the privileges of the public schools of Buchanan county; and hence this action.

At the trial of the cause the jury rendered a verdict for the defendant, which the court refused to set aside, and entered the judgment thereon to which this writ of error was awarded.

We shall not undertake to discuss in detail the 17 assignments of error relied on for a reversal of the judgment complained of, nor is this necessary as many of the questions therein presented are not likely to arise upon another trial of the case.

The main questions presented in the record and most elaborately argued before this court are: (1) Were the words alleged to have been spoken and published by defendant in error actionable? and (2) whether or not the words spoken were spoken and published in the exercise of the right and privilege, if not the duty, of defendant in error in protesting against plaintiff's son, Melvin, or any other pupil not authorized by the law of Virginia so to do, attending the same public school that defendant in error's children attended?

[1] That to speak of one or more persons as negroes, if untrue and they be white persons as a matter of fact, is scandalous and defamatory counsel for defendant in error concedes, but

contends that by reason of the adoption of the thirteenth, fourteenth, and fifteenth amendments to the federal Constitution such words are not actionable, since the negro thereby "has practically been declared the peer of the white man of the purest and best Caucasian blood," and that, "the negro being by the law declared equal to the white man, the law can not hold that it is any more scandalous, malicious, and defamatory to call a white man a negro than to call a negro a white man."

Upon the soundest reasoning, founded on common knowledge and authority, this contention is wholly without merit.

In Strauder *v.* West Virginia, 100 U. S. 303, 306, 25 L. Ed. 664, it was held that the thirteenth, fourteenth, and fifteenth amendments to the federal Constitution were designed to accord to the negro race the same protection in life, liberty, and property which was already enjoyed by the white race, but nowhere in the court's opinion is reference made to the social relations of the two races. The opinion of Mr. Justice Strong, speaking for the court, in that case uses this language:

"The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence."

In Flood *v.* News & Courier Co., 71 S. C. 122, 50 S. E. 637, 4 Ann. Cas. 685, the court cites Strauder *v.* W. Va., supra, and cases, as authority for the proposition that the adoption of the thirteenth, fourteenth, and fifteenth amendments to the federal Constitution has not in any way affected the social distinction subsisting between the two races, and in the opinion of the court it is said:

"When we think of the racial distinction subsisting between the white man and the black man, it must be apparent that to impute the condition of the negro to a white man would affect his (the white man's) social status, and, in case any one published a white man to be a negro, it would not only be galling to his pride, but would tend to interfere seriously with the social relations of the white man with his fellow white man, and to protect the white man from such a publication, it is necessary to bring such a charge to an issue quickly."

The authorities uniformly recognize that said amendments to the federal Constitution were designed to accord to the members of the negro race the same protection in life, liberty, and property which was already enjoyed by the white race, that in our courts of justice the negro race stands on the same plane as the white race, and that our laws bear equally on all without regard to race, color, or previous condition; but it is with the same uniformity of ruling recognized that our social conditions are very different.

As said in the case of Spotorno v. Fourichon, 40 La. Ann. 423, 4 South. 71:

"Under the social habits, customs, and prejudices prevailing in Louisiana, it can not be disputed that charging a white man with being a negro is calculated to inflict injury and damage. We are concerned with social conditions simply as facts. They exist and, for that reason, we deal with them. No one could make such a charge knowing it to be false without understanding that its effects would be injurious, and without intending to injure."

What was said in that case with respect to social habits, customs, etc., prevailing in Louisiana applies with equal force to any state or locality in which the white and negro races are established as citizens. The words charged in the declaration in this case as having been used and published by defendant in error of and concerning plaintiff in error and his family, stripped of the profane language which adds nothing to the force and effect of the words used, except perhaps as tending to prove malice, must be construed in the plain and popular sense in which the rest of the world naturally would understand them, and, when so construed, they charged plaintiff in error and his children with being negroes, which if untrue was calculated to inflict injury and damage upon him, and for which he has a cause of action.

[2, 3] While defendant in error might have, in the performance of a duty, legal or social, or in defense of his own interests, raised the question before the proper school authorities as to whether or not plaintiff in error's son, Melvin, should attend the same school that defendant in error desired his children to attend, whether this privilege has been used in good faith and without malice was the province of the jury in this and all like cases to determine. The principle of law is the same where the privilege has been lost by the use of slanderous, defamatory, or insulting words, spoken in strong and violent language disproportioned to the occasion and sufficient to overcome the weight of the privilege and raise an inference of malice, as in a case for the recovery of damages occasioned by the publication of a libel. Tyree v. Harrison, 100 Va. 542, 42 S. E. 295; Farley v. Thalhimer, 103 Va. 504, 49 S. E. 644.

"From motives of public policy the law recognizes certain communications or publications as privileged—that is, communications which under ordinary circumstances would be slanderous or libelous are held to be privileged when spoken or written on or in connection with a lawful occasion. Privileged communications are of two kinds, those absolutely privileged and those qualifiedly privileged. An absolute privileged communication is one

for which an action will not lie, even though the words are published maliciously and with knowledge of their falsity, whereas a qualified privileged communication is one which is prima facie privileged only and in which the privilege may be lost by proof of malice in the publication of the libel or slander. The occasion of making a communication qualifiedly privileged rebuts the prima facie inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the onus of proving malice in fact." 25 Cyc. 375.

In the case here it is an admitted fact that the defendant in error, in speaking of the child of plaintiff in error, used the most profane, uncalled for, and violent language; and the uncontradicted fact is that up to the time that a brother of plaintiff in error had been charged with the murder of a brother of defendant in error, the plaintiff in error and the defendant in error had been good friends, the former and his family had been working for the latter from time to time, eating at his table, sleeping in his beds, and associating generally with his family, but as soon as the trial was had in which the brother of the plaintiff in error was accused of killing the brother of defendant in error, and from that time on, the defendant in error ceased speaking with plaintiff in error, appearing to be mad, and up to that time he had no objections or utterances to make as to plaintiff in error being a negro, and had made no objection to his children attending the same school with the child of defendant in error. It also appears from uncontradicted evidence in the case that defendant in error paid the expenses of a member of the school board of trustees of Buchanan county, Va., on two occasions, to Johnson county, Ky., to procure affidavits to be used by him in furtherance of his purpose, and then procured a meeting of the school trustees of Buchanan county and the dismissal of plaintiff in error's child, Melvin, from the white school, without any notice to him of these proceedings, and without giving him an opportunity to be heard in defense of himself or his child.

This court in Farley *v.* Thalhimer, supra, quotes from Dillard *v.* Collins, 25 Gratt. (66 Va.) 353, as follows:

"The law holds the ægis of its protection, not only over the person and property of a citizen, but vigilantly guards as equally sacred his personal reputation and character. And where one assails the character of his fellowman, and would secure himself from responsibility upon the ground that what he has spoken or written was only done confidentially and with no intent to injure, and without malice, he must be careful that what he said or wrote comes within the well-defined qualification which the law attaches to confidential * * * communications."

[4] At the trial of this cause defendant in error made no at-

tempt to prove that plaintiff in error's wife, mother of his son, Melvin, had any negro blood in her, but did attempt to justify the speaking of words as charged in the declaration by proof of their truth—that is, that plaintiff in error and his children were negroes, and that this negro blood came through him—and upon this issue of fact the case was tried. A number of reputable citizens testified as to their acquaintance with plaintiff in error's father and grandfather, the knowledge of the witnesses as to their standing and reputation as white men, and in effect these witnesses say that they know of no fact or circumstance from which it could be fairly inferred that either the father or grandfather of plaintiff in error had any negro blood in him. It is true that several witnesses for defendant in error say that the grandfather of plaintiff in error had some of the appearances of a negro, but none were able to say what proportion of negro blood, if any, he had in him, and with one exception all agree that the Spencers were regarded as white people, and that the senior Spencer and his family attended the white schools and churches. One of these witnesses, who had been a county judge, circuit court clerk, and an attorney then in practice and had known the senior Spencer 55 or 60 years, was asked on cross-examination:

"During all the time you knew him he was regarded as a white man and so accepted among the neighbors where he lived?" Ans. "Yes, sir."

There is practically no evidence as to plaintiff in error's father appearing to have negro blood in him, and therefore the strongest evident adduced in the case to establish that plaintiff in error and his family were negroes was given by defendant in error's witness, Bilisoly, from the city of Norfolk, Va., who was introduced as an expert witness. He, upon having plaintiff in error's boy, Melvin, pointed out to him in the presence of the court and jury, said:

"Well, he looks like there is negro blood in him. His nose, lips, and chin are very much like the negro, but it is impossible for me to tell the exact proportion of negro blood in him."

On cross-examination:

Q. "It is absolutely impossible for you to tell how much of negro blood, if any, that child [Melvin] has, isn't it?" A. Yes, sir; it is impossible for me to tell just how much."

On redirect examination the witness was asked:

"Look at that man [pointing to plaintiff in error] and tell us what you think of him?" A. "Well, sir, he has some of the features of a negro."

Again, on cross-examination, the witness was asked:

"Look at that woman [pointing to Mary Spencer, sister of plaintiff in error]; what do you think of her?" A. "I would

consider her a white woman." Q. "Do you think there is any blood in her other than pure Caucasian blood?" A. "No sir; I do not; I would consider her of pure Caucasian blood; I don't think she is of negro blood." Q. "Look at that lady [pointing to the mother of plaintiff in error]. Do you think she has any negro blood in her?" A. "No, sir; I do not; she is a white woman." Q. "Look at that man [pointing to the father of plaintiff in error]; what do you think of him?" A. "Let me see his hair. His hair looks a little like a negro. I believe there is some negro there; I can't say how much."

Such evidence as this, given by one not shown to be qualified to speak as an expert witness with respect to the issue in the case, has little or no probative force, since it is but a mere expression of the witness' opinion, borne out by a fact or circumstance proved, from which it could be reasonably deduced that the opinion or opinions of the witness that plaintiff in error and his son Melvin, had negro blood in them were well founded. Certainly it could not be fairly deduced from this, or any other evidence given in the case, that plaintiff in error or his children have as much as one-sixteenth of negro blood in them.

Of the nine instructions to the jury asked for by plaintiff in error the trial court modified Nos. 5, 7, and 9, and refused instructions numbered 3 and 8.

[5] Instruction No. 5, as asked, is as follows:

"The court tells the jury that strong or violent language disproportioned to the occasion may of itself raise an inference of malice."

To which the court added:

"Except where the jury may believe from the evidence that the party using the language was engaged in a bona fide investigation for a lawful purpose."

The authorities already referred to sustain the proposition of law embodied in the instruction as asked. There was evidence tending to support plaintiff in error's theory of the case as presented in this instruction, and it should have been given as asked. While one may be privileged to engage in a bona fide investigation for a lawful purpose, such privilege must be used in good faith and without malice, and can never be made to serve as a shelter for slander, or to justify the use and publication of strong or violent language disproportioned to the occasion.

[6] Instruction No. 7, as asked, stated as a proposition of law that if the jury believed from the evidence that defendant in error used and uttered the words in the declaration mentioned in bad faith and with malice, then plaintiff in error was entitled to recover in this action damages on account of using and uttering said words, and correctly told the jury how the damages

should be assessed; but the court so modified the instruction that the jury could not find damages in favor of plaintiff in error unless they also believed that he and his son, Melvin, each had less than one-sixteenth negro blood in them. We do not see, however, that plaintiff in error was prejudiced by the modification of this instruction, since the same proposition of law propounded in the modification is contained in his own instruction No. 9, as asked and given by the court, with a modification.

[7] Instruction No. 9, as asked, is as follows:

"The court instructs the jury that even should they believe from the evidence that it was the neighborhood report prior to July 11, 1911, that the plaintiff and his children were negroes, yet if they believe that the said plaintiff's children were permitted to go to and attend the public free schools of this state until the statements of the defendant, and they believe that the defendant made the statements that the plaintiff and his children were negroes, and secured and published affidavits that the plaintiff and his children were negroes, and that by reason of the defendant's said statements the plaintiff's child, Melvin Spencer, was refused admittance and attendance to the public free schools of Buchanan county, then you must find for the plaintiff and assess his damages at such sum as you believe he has suffered and will suffer by reason of the refusal of his children admittance to the public free schools of Buchanan county, unless you believe the words spoken by the defendant and published in the affidavits were true, and the said plaintiff's children have one-sixteenth or more negro blood in them."

The modification of this instruction complained of in effect told the jury that they might, in assessing damages in the case, consider the neighborhood reports prior to July 11, 1911, referred to in the instruction.

The question submitted to the jury by the instruction, as asked, was, in short, whether plaintiff in error's children had one-sixteenth or more negro blood in them. and mere reports in the neighborhood prior to the origin of this suit had nothing whatever to do with the jury's assessment of damages in the case, if their verdict was to be for the plaintiff.

[8] Plaintiff in error's instructions Nos. 3 and 8, which were refused, are as follows:

No. 3. "The court tells the jury that if they believe that Jordan Spencer, Sr., the great-grandfather of Melvin, had less than one-half negro blood and more than one-half white or Indian blood, and that if they believe that his wife was a white woman, with no negro blood in her, and that then that Jordan Spencer, Jr., the grandfather of Melvin, would have less than one-fourth negro blood in him, and then if they believe that the wife of

Jordan Spencer, Jr., had notnegro blood in her, George Spencer, the father of Melvin, would have less than one-eighth negro blood in him, and that if they believe that the wife of George Spencer and the mother of Melvin, was a white woman with no negro blood in her, then Melvin Spencer has less than one-sixteenth of negro blood in him, and is a white person, and is entitled under the laws of the state of Virginia to attend the public white free schools of Buchanan county, Va."

No. 8. "The court instructs the jury that if from the evidence they believe that the words contained in the declaration were used by the defendant, and were untrue, and if they further believe from the evidence that the defendant had reiterated the said words, then this is a circumstance tending to show malice on the part of the defendant."

These instructions we think were proper, in view of the facts which the evidence in the case tended to prove.

The giving of instructions Nos. 4 and 7 for defendant in error is assigned as error. These instructions, it is true, in effect told the jury that if they believed from the evidence that plaintiff in error and his son, Melvin, has one-sixteenth or more of negro blood in their veins, they should find for the defendant, but when considered along with other instructions given by the court, and which we have indicated should be given at another trial of the case, we do not consider it necessary to discuss said instructions 4 and 7 further.

[9] In the course of the trial plaintiff in error offered in evidence two photographs, which he stated were correct pictures, the one a picture of his grandfather, and the other a picture of his grandfather's daughter and her children, sent to plaintiff in error's father in a letter a few years prior, but upon objection made by defendant in error the court would not permit the photographs to be shown to the jury, stating as a reason for the ruling that the court was of opinion that they were taken from other photographs, to which ruling plaintiff in error duly excepted, embodying in the exceptions the reasons of the court therefor.

We are of opinion that this ruling was erroneous. There was no evidence in the case contradictory of plaintiff in error's statement that the photographs were true and faithful representations of his grandfather and aunt and her children, and it was for the jury, and not the court, to determine what credit or weight should be given them as evidence in the case. I Greenleaf on Ev. (16th Ed.) § 439h; 17 Cyc. pp. 414, 415, and note, p. 416.

With respect to assignments of error 11, 12, and 13, we deem it necessary to say only that the evidence admitted over the objections of plaintiff in error set out in his bills of exceptions, which are made the ground of these assignments of error, was imma-

terial and irrelevant to any issue involved in the case, and therefore, should have been excluded.

[10] One Jno. W. Flanagan, a witness on examination in chief for the defense, who had not shown himself competent to answer such a question, was, over the objection of plaintiff in error, and permitted to answer the following question:

"From his [Melvin's] lips, nose, yellow skin, how much [negro blood] do you think he is?" A. "From his appearance it looks like to me he had more than one-sixteenth; I don't know that he has any negro blood in him."

The overruling by the court of his objection to this question and answer constitutes plaintiff in error's fourteenth assignment of error, which assignment is also well taken. Not only had the witness not shown himself competent to answer the question, but, on the contrary, he had made express statements to the effect that he was not.

The evidence given by one George Stevenson, a witness for the defense, permitted to go to the jury over the objection of plaintiff in error, was not only without probative force, but was wholly irrelevant and immaterial to any issue in the case, and should have been excluded.

For the foregoing reasons the judgment complained of is reversed, the verdict of the jury set aside, and the cause remanded to the circuit court for a new trial therein to be had in accordance with the views expressed in this opinion.

Reversed.

Note.

The false appellation of "negro" is not included in the different actionable words at common law as classified in Moseley *v.* Moss, 6 Gratt. 534, unless special damage be shown. Such words are, therefore, not slanderous per se at common law, and it is so held in Williams *v.* Riddle (Ky.), 140 S. W. 661 and Johnson *v.* Brown, Fed. Cas. No. 7,375. In Williams *v.* Riddle, it is said: "Under both authority and reason, we are clearly of opinion that the words used in this case, which charged that plaintiff was 'a damn negro, and his mother was a mulatto,' were not actionable per se."

In McDowell *v.* Bowles, 53 N. C. (8 Jones, L.) 184, decided in 1860, the defendant had said that the plaintiff, a Baptist minister of the gospel, "was a free negro." In sustaining a nonsuit, the court said: "We are not aware f any class of defamatory words which are held to be actionable, that would embrace the language complained of in this case. The three classes most usually found in elementary books are: (1) Words that impute a crime or a misdemeanor, punishable by an infamous penalty. (2) Words that impute any contagious disease, by which the party impugned would be excluded from society. (3) Words derogatory to one in respect to his office, profession, or calling. The case before us is not embraced in any of these classes. It is obviously not in the first. It is not in the second, for the reason that this class has been strictly confined to the imputation of certain diseases of a loathsome or pes-

tilential nature. It is not in the third, because the offensive language is not spoken of the plaintiff in respect to his calling, which is indispensable to the actionable character of words in that class." "Thus stands the law, as we conceive, in respect to words alleged to be actionable of themselves with respect to all other disparaging words, outside of the limitation prescribed, special damage must be alleged and proved." Williams *v.* Riddle, 145 Ky. 459, 140 S. W. 661, 36 L. R. A., N. S., 974, 979.

But there are a number of cases which hold such appellation is negligent per se. See Flood *v.* News & Courier Co. (S. C.), 50 S. E. 637, and Spotorno *v.* Fourichon (La.), 4 So. 71.

To call a white man a negro, or to intimate that a white man is of African descent, under certain circumstances, may be an insult, and, dependent upon the circumstances, may be actionable. The courts can take judicial notice of social status, and of the superiority and inferiority of races, without affecting the civil rights of the citizen. An existent fact, which is per se neither the subject of legislation nor adjudication, can be judicially known and recognized as a fact. Certainly every court is presumed to know the habits of the people among which it is held, and their characteristics, as well as to know leading historical events and the law of the land. To recognize inequality as to the civil or political rights belonging to any citizen or class of citizens, or to attempt to fix the social status of any citizen, either by legislation or by judicial decisions, is repugnant to every principle underlying our republican form of government. Nothing is further from our purpose. Under our benign institutions "every man is the architect of his own fortune." Every citizen, white and black, may gain, in every field of endeavor, the recognition his associates may award That is his right, and his own concern. But the courts can take notice of the architecture without intermeddling with the building of the structure. It is a matter of common knowledge that, viewed from a social standpoint, the Negro race is in mind and morals inferior to the Caucasian. The record of each from the dawn of historic time denies equality. Wolfe *v.* Georgia Ry. & Electric Co., 2 Ga. App. 499, 58 S. E. 899, 901.

The Virginia Code provides that, "All words which, from their usual construction and common acceptation, are construed as insults and tend to violence and breach of the peace, shall be actionable." 2 Va. Code, § 2897. Words will be understood by the courts in the sense in which they were understood by the bystanders. Hoyle *v.* Young, 1 Wash. 150, 1 Am. Dec. 446; Cave *v.* Shelor, 2 Munf. 194.

Under United States Constitution.—The thirteenth, fourteenth and fifteenth amendments are prohibitions upon the states intended to secure the negro race equal protection of the law, etc. In the present case the rights of the colored race are not involved at all. There is, therefore, no constitutional guaranty which can be invoked and, if there were, it could be invoked only by some person whose constitutional rights were deprived him. The defendant has no standing to complain that a constitutional right is being deprived the negro race.

The general rule that no person has any standing in any court as a suitor unless he alleges and shows that he has an actionable interest in the rights which he seeks to recover, or that he has suffered or will suffer an actionable injury by reason of the wrongs which he seeks to redress or prevent, applies with full force to persons seeking to raise constitutional questions in the courts of justice. In order to maintain an action or suit, they must establish

that they have an actionable interest in the constitutional rights which they seek to protect. Worcester *v.* Georgia, 8 Pet. 515, 595, 8 L. Ed. 483.

"This court does not listen to objections of those who do not come within the class whose constitutional rights are alleged to be invaded; or hold a law unconstitutional because, as against the class making no complaint, the law might be so held." New York *v.* Reardon, 204 U. S. 152, 51 L. Ed. 415.

Persons residing within the limits of the Cherokee nation in the state of Georgia were not entitled to question the constitutionality of the Georgia statute extending the jurisdiction of the state of Georgia over the Cherokee Indians and the territory occupied by them and forbidding a white person to reside within the limits of the Cherokee territory without permission from the state of Georgia, except so far as such laws affected their liberty or interests. (Opinion of McLean, J.) Worcester *v.* Georgia, 6 Pet. 515, 595, 8 L. Ed. 483.

T. B. B.